

ONTARIO HUMAN RIGHTS CODE
R.S.O. 1990 c. H. 19

BOARDS OF INQUIRY

BETWEEN:

Donna Slobodian

Complainant

and

Ontario Human Rights Commission

Commission

and

Adam's Warehouse Burlington Limited
and Lennox Mitchell

Respondents

DECISION

BOARD OF INQUIRY: R. Hartman

APPEARANCES: J. Scott, Counsel for the Commission

D. Slobodian, Complainant

DATE AND PLACE
OF HEARING: February 1, 1994, Toronto, Ontario

1. Proceedings

On April 7, 1993, I was appointed, pursuant to the Human Rights Code, to chair a Board of Inquiry into the complaint of Ms. Donna Slobodian, dated August 22, 1990, alleging discrimination in employment on the basis of sex, sexual solicitation and harassment by Mr. Lennox Mitchell and Adam's Warehouse.

A hearing was commenced by conference call on May 5, 1993, and continued by conference call on May 17, 1993. Hearing dates were set for February 1, 2, and 3, 1994.

Present at the hearing on February 1, 1994 were: Ms. Slobodian, the complainant; Ms. J. Scott, Counsel for the Ontario Human Rights Commission; Ms. L. Nowak, the complainant's mother; and Mr. D. Cobb, Human Rights Officer. The complainant's spouse was present as an observer during closing submissions. K. Laird and C. Noble were present as observers for part of the hearing.

No one attended on behalf of the respondents, Lennox Mitchell and Adam's Warehouse. The following efforts were made to determine whether the hearings should proceed in their absence:

- a) The Boards of Inquiry Office advised me that, in addition to written notice, it had confirmed the dates of hearing by telephone with both Mr. Eric Adams, of Adam's Warehouse, and Mr. Lennox Mitchell. The respondents were also advised that the hearing could proceed in their absence if they failed to attend.
- b) Ms. K. Laird, counsel for the Boards of Inquiry, made telephone inquiries on the morning of the hearing to confirm the Respondents' intention to participate. Mr. Lennox Mitchell was telephoned at his workplace, Adam's Warehouse in Hamilton, and told Ms. Laird that he "might" attend. Mr. Eric Adams informed Ms. Laird that he would not

attend on any of the hearing dates. Neither requested an adjournment of the proceedings.

On the information presented, I was satisfied that the Respondents had been properly notified of the hearing, and chose not to participate. The hearing proceeded in their absence, in accordance with s. 7 of the Statutory Powers and Procedures Act.

2. Nature of the Case

Ms. Slobodian alleges that her right to be free from sexual harassment and solicitation, and discrimination on the basis of sex, in employment was infringed in January, 1990 by Mr. Lennox Mitchell, in the St. Catharines store where they both worked. She also alleges that when she reported Mr. Mitchell's actions to their employer, Adam's Warehouse, no efforts were made to resolve the matter.

The Commission made two requests for preliminary rulings at the commencement of the hearing:

- a) to amend the complaint to correctly identify the respondent Adam's Warehouse; and
- b) to add United Salvage Canada Inc. as a party to the complaint.

The first request was granted at the commencement of the hearing. A ruling on the second was reserved. On the basis of information received and for reasons set out later, I was satisfied that there had been sufficient notice to the Respondents of the issues raised by the preliminary requests and that there would therefore be no breach of natural justice or administrative fairness in considering them.

3. Relevant Provisions of Code

By section 5 of the Code, every person in Ontario has a right to equal treatment with respect to employment without discrimination because of sex. Section 7(2) provides:

Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.

Further by section 7(3), every person has a right to be free from:

- a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; ...

The Code defines "harassment" as meaning "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome".

4. Evidence

The evidence heard consisted of sworn testimony from Ms. Slobodian, Ms. Nowak, and Mr. Cobb.

In addition to the written complaint on August 22, 1990, the following documentary evidence was presented:

- a) notes in January, 1990 handwritten by Ms. Slobodian recording particulars of harassment;
- b) Record of Intake by a Commission official in February, 1990; Ms. Slobodian's Record of Employment and T4-1990;

- c) a letter from Eric Adams, Adams Warehouse Burlington Ltd., to the Commission dated September 5, 1990, responding to the allegations in Ms. Slobodian's complaint; and
- d) records of corporate searches of Adams Warehouse Burlington Ltd., 775642 Ontario Limited, and United Salvage Canada Inc.

a) Background

Ms. Slobodian left high school at age 16, worked for one year at a donut shop, took a 6 month secretarial course but did not complete it, worked in a coffee shop and later in a bowling alley. She married at age 21.

In December, 1989, at age 22, she was shopping in St. Catharines, where she lived, in a store identified outside by the sign "Adam's Warehouse". This was a discount store which sold furniture, toys, food and other items gleaned from fire and bankruptcy sales. While in the store, she saw a sign indicating a job as cashier was available and she applied. She was interviewed by Lennox Mitchell, the manager of the store, who hired her a week later.

On Monday, December 20, 1989, Ms. Slobodian began working in the store, under the direct supervision of Mr. Mitchell. His job as manager included assembling furniture, displaying it and other merchandise for sale, and supervising and hiring staff as required. Her job as cashier included duties such as stocking shelves, dusting, vacuuming, and tending the cash register.

Ms. Slobodian worked Monday to Friday, from 9 or 10 till 4, for a take-home salary of \$200 weekly. Mr. Mitchell was the only other person working in the store for most of her shift. There was sometimes an overlap between her shift and

the start of the shift of a person who replaced her at 4 p.m. A student who worked as cashier from 4-9 p.m. on weekdays and 10-6 p.m. on Saturdays would sometimes arrive earlier than 4 p.m. Ms. Slobodian was usually picked up from work by her husband at 4 p.m.

Ms. Slobodian described the physical setting of the workplace. The store occupied commercial space at street level, and was a narrow rectangle in shape. As one entered at the front, to the left was an archway opening on to a small carpet display area, and at the far end of the rectangle, an office. In front of the office, there were displays of furniture such as kitchen tables, counters, etc. Behind the office was a shipping/receiving/general storage area.

Ms. Slobodian testified that throughout December, 1989, and most of January, 1990, she had no difficulties or concerns regarding her job. Mr. Mitchell, both in the interview and up to late January, 1990, was, in Ms. Slobodian's words, "quiet". They did not converse except regarding duties to be completed in the store. Ms. Slobodian would be alone with Mr. Mitchell in the store, which was empty of customers for most of the day, until the student arrived for her shift.

On January 24, 1990, however, Ms. Slobodian said that Mr. Mitchell's behaviour changed completely, and was such that she had to quit her job on February 1, 1990, fearing for her safety.

b) Particulars of Harassment and Solicitation

The following is the account of events given by Ms. Slobodian at the hearing and as written down by her in early February, 1990.

On Wednesday, January 24, 1990, when Ms. Slobodian came in to work, Mr. Mitchell was there as usual. Over the course of the day, as she was walking around the store, stocking shelves and cleaning, Mr. Mitchell kept saying that he was "horny" and "blew kisses to [her]; asked [her] to do something to him for excitement; asked for a kiss when [she] was going home; said he wanted [her]; [and] said he was going to kiss [her] before [she] left for the day".

Ms. Slobodian said that at first, she just ignored this new behaviour as best she could, not sure what else to do. She also protested and told him she would quit if he continued with this behaviour. She said that he just laughed and said that she was joking. She said: "I'm not joking. If you keep it up, I will quit!"

Ms. Slobodian said that on Thursday, January 25, 1990, the same behaviour was repeated but he now told her also that he had dreamt about her. She said that this frightened her. He again asked for a kiss before she left at the end of the day which she again refused. His comments were always made when there was no one else in the store. At the hearing, Ms. Slobodian said this new behaviour of Mr. Mitchell continued until Wednesday, January 31, 1990, when events escalated.

On Wednesday, January 31, 1990, Mr. Mitchell increased the verbal sexual comments and became more graphic and physically aggressive. His actions included the following:

- a) He told her the different "ways he likes it with his girls", and asked her how she liked having sex, and what she would do to him sexually, if she could. She replied by saying that it was none of his business and she would not tell him. She said that he responded by saying that he "likes women who talk dirty" and that he "likes to tempt women, and if something happens, that's good".

b) Later, while Ms. Slobodian was sitting down at one of the table displays, Mr. Mitchell told her he fantasized about her smell and taste and asked her if she fantasized about his. Ms. Slobodian stated that he also asked her if he could "suck on [her] nipples" and asked her to give him "a hand job".

c) While she was working stocking the shelves, he stuck his tongue out at her as he passed by and moved it "as in sexual motion".

d) An hour before the end of her shift on January 31, Ms. Slobodian was resting on a stool at a kitchen counter display in front of the office. She sat facing the door to the street. There was no customer in the store at the time. Mr. Mitchell came up to her, put his hands on her leg, grabbed her, tried to massage her, put his arms around her and tried to kiss her. She told him to stop and pushed him away. Before she left for the day, she said that Mr. Mitchell told her "not to mention anything" to her husband, who was coming to pick her up.

Ms. Slobodian stated that she was frightened by the events on January 31, 1990. She recalled that on one occasion that day, after she had told him to stop, he did so for an hour but then continued with his behaviour becoming worse, culminating in the incident at the kitchen counter. Her concerns about Mr. Mitchell's intent and her safety were amplified as well by the fact that Mr. Mitchell had asked her that day to work the following Sunday, when the store was closed, to unpack some pet supplies. She said that he offered to pay her "out of his own pocket". She was now very worried about being alone with Mr. Mitchell. Ms. Slobodian, 5'3", said that Mr. Mitchell was 6' tall, medium build.

Asked if she reported Mr. Mitchell's actions to anyone during the week that they occurred, she said that she told her husband about Mr. Mitchell grabbing her, but did not tell him "exactly everything" about what he had said to her. She said that her husband told her that she should just tell Mr. Mitchell "to lay off". She also recalled that on the morning of February 1, 1990, she called her mother and told her about being scared to go to work, giving examples of Mr. Mitchell's actions.

c) Reporting to Employer

On Thursday, February 1, 1990, Ms. Slobodian telephoned the store just prior to her shift and said to Mr. Mitchell "I quit", and hung up. She heard nothing further. Two weeks later, Ms. Slobodian called Mr. Mitchell to ask if her separation papers had come in. He replied that they had not and that he had no idea where they were.

In mid-February, 1990, Ms. Slobodian decided to call the "head office" of her employer. She telephoned Adam's Warehouse in Hamilton who issued her paycheques and spoke with a woman she assumed to be "the secretary". When she asked for her separation papers, she said that the woman expressed surprise, saying that they did not know that she had quit. When she was asked why she had quit, Ms. Slobodian asked to speak to "the head person" and was put through to "David Cole". She assumed Mr. Cole was the owner, because of her request and because the secretary did not know what to do and had put her through to him. Mr. Cole's exact position is not known. Given the failure of the respondent to participate in the hearing, there is nothing to counter the inference that he was in a position to speak for, and on behalf of, the employer.

Ms. Slobodian said that she explained to Mr. Cole why she had quit and gave him examples of Mr. Mitchell's behaviour and statements. She specifically told Mr. Cole that Mr. Mitchell had asked to suck on her nipples and said that she did not think she should have "to work like that". Mr. Cole apparently agreed and then telephoned Mr. Mitchell and called Ms. Slobodian back a few minutes later. Mr. Cole reported to her that Mr. Mitchell had said he was "just joking and didn't mean anything by it". Ms. Slobodian told Mr. Cole that she did not think it was a

joke, and said that he replied: "No, I don't blame you. But there is not much that we can do. It is up to you, if you want to take it any further." Ms. Slobodian received her separation papers in the mail a week later.

Ms. Slobodian said that after this conversation with Mr. Cole, she received a telephone call from Mr. Mitchell who was "mad" about her having called "head office", since he was "only joking". She reminded him that she had told him that she did not like it, and that it was not a joke to her, and then hung up.

d) Testimony of L. Nowak

Ms. Nowak, the complainant's mother, also lived in St. Catharines at the time Ms. Slobodian worked for Adam's Warehouse. She testified that she would usually receive a telephone call from her daughter before she went to work. She said that during one of these calls, her daughter "sounded kind of scared". She asked her if something was wrong. She said that her daughter at first said no, but then started crying and told her about her boss wanting to hug her, and telling her that he "loved big breasts and wanted to suck her nipples", that he had asked her to come in to work on a Sunday, and that he had said he could make "better love" to her than her husband.

Ms. Nowak said that this was the first time her daughter had said anything to her about Mr Mitchell and it was only after she had drawn it out of her. She said that she told her daughter that it sounded like sexual harassment. Her daughter responded that she did not know what to do, adding: "I am just going to quit then. I am scared of him."

e) Report to Commission

According to a written Record of Intake, Ms. Slobodian first contacted the Commission on February 23, 1990 and alleged sexual harassment on the part of Mr. Mitchell, Manager of Adam's Warehouse in St. Catharines. On February 27, the Commission called Mr. Mitchell and reported that Mr. Mitchell said that he never intended to harass her, "just tried to joke" and when he found out "she is tight about it, he stopped joking". The investigator asked Ms. Slobodian "what remedy she will be satisfied with if case proceeds". She replied that she would accept being reimbursed for the six weeks' of unemployment insurance she lost because she had to quit. This was relayed to Mr. Mitchell on February 27, 1990, who is reported to have said "no but he will speak to head office".

After receiving Ms. Slobodian's formal complaint dated August 22, 1990, Mr. Eric Adams wrote to the Commission, on September 5, 1990, on stationery headed "Adams Warehouse Burlington Ltd." as follows:

I have received your letter and complaint re the above Donna Slobodian and I have read the twelve allegations.

I am amazed that from December 20, 1989 to February 17, 1990, our office did not receive one complaint from this lady.

I personally visited our store in St. Catharines on many occasions and talked to this lady and at no time, did she mention sexual harassment to me.

Lennox has been employed with our firm for approximately five years. I consider Lennox one of my most valuable employees.

Over the past five years, I have not received one complaint of sexual harassment from our employees or customers. However, I have witnessed racial slurs against Lennox on many occasions.

Finally, I have discussed these allegations with Lennox and he denies all twelve allegations as we do from a company standpoint.

Neither Lennox nor our company will be answering your Questionnaire.

Further action by Donna Slobodian or your department can be forwarded to Mr. William C. West, [address of solicitor].

Mr. Cobb testified at the hearing that in December 1991 he was part of a Special Task Force to address a Commission backlog and was assigned Ms. Slobodian's file to investigate. He said that the Record of Intake notes were written by A. Hashimi, a Human Rights Officer with the St. Catharines office. He said that when he got the file, he contacted Mr. West as directed by the respondents in the above letter. He recalled great difficulty obtaining any information from Mr. West, who would say he would get back to him and then never did. Mr. Cobb said that he did not contact Mr. Mitchell or Mr. Adams directly because of the Commission's policy to contact the solicitor, where instructed to do so. Mr. Cobb said that he requested the names of other employees, and prior employees, but these and other requests for information were not met. Virtually no additional information was obtained by the Commission, other than a corporate search ordered by the Commission.

5. Factual Findings of the Board

No information was submitted to the Board for consideration by the Respondents, Lennox Mitchell and Adam's Warehouse. Both the employer and Mr. Mitchell chose not to participate in this hearing de novo into the allegations set out in Ms. Slobodian's complaint. The findings, therefore, must rest on the viva voce evidence and the written record presented by the Commission at the hearing.

While I would have preferred to make factual findings, weighing both the testimony of Ms. Slobodian and Mr. Mitchell, I have no difficulty finding Ms.

Slobodian a credible witness. I was impressed with the sincerity and straightforward demeanour of all those who testified. There being no contrary evidence, and given the credibility of testimony received, I accept that the events occurred as described by Ms. Slobodian.

An indirect reference to Mr. Mitchell's race was made in Mr. Adams' letter to the Commission. I heard nothing in the testimony to suggest racial bias against Mr. Mitchell. Ms. Slobodian had no problems working with him until January 24, 1990, when his behaviour toward her changed completely. This change in behaviour was based on sexual gender, not race.

In September 1990, Mr. Adams reported that Mr. Mitchell denied all "twelve allegations" in the written complaint. (The complaint contains 12 numbered paragraphs, not all of which contain allegations.) However, it is noteworthy that Mr. Mitchell in reported conversations in February, 1990 with Mr. Cole, and with Mr. Hashimi of the Commission, at no time denied that he had made the statements, only that he had intended them as a joke. Although given the opportunity to put forward his version of events, and respond to the allegations against him, Mr. Mitchell has failed to do so, from 1990 to the present. One can only infer from this that he has nothing further to add.

From Ms. Slobodian's testimony, it is evident that Mr. Mitchell was attempting a sexual encounter of some kind with her. Ms. Slobodian was under his complete control and supervision, an employee who owed her job to his having hired her, an employee whose continued employment depended on his favourable assessment of her work. Mr. Mitchell flagrantly abused his position as Ms. Slobodian's superior in the hierarchy of their employment relationship to indulge in his personal sexual

fantasies, at the expense of her dignity and privacy, and did not stop until she removed herself from his control, at the expense of her livelihood.

I have no difficulty in concluding that the comments and conduct of Mr. Mitchell over the period of a week, from January 24 to 31, 1990, were "vexatious" and were known or ought reasonably to have been known by Mr. Mitchell to have been unwelcome. Ms. Slobodian repeatedly told him to stop and physically refused his advances. He stopped in response to her request only once, for an hour, according to Ms. Slobodian, after which his behaviour escalated to the point of physical aggression. To protect herself from further abuse by Mr. Mitchell of his position of authority, Ms. Slobodian sacrificed her job. When she reported it to "head office", she was told there was nothing that the employer could do and any further action was up to her.

I have noted Mr. Mitchell's passing off his undenied behaviour as "just a joke". Humour can be one of life's treasured joys. But it can also be a tool of implicit aggression, conveying thoughts, which if stated without the cloak of humour, would clearly offend another's dignity and risk disfavour. What is intended as a joke by A may not always be received as a joke by B, not because B lacks a sense of humour but because B sees what is under the cloak, so to speak. For sexual thoughts or statements to be perceived as humour, A and B require, at the very least, a similar sense, viewpoint, or interest. Above all, such humour requires an appropriate context.

In this case, on the evidence heard, there is no reasonable basis on which to conclude that Mr. Mitchell's statements about his sexual practices, preferences, or interest in Ms. Slobodian's anatomy were either intended or received as a joke. I note especially the context in which they were made and the fact that they were accompanied by physical contact which made obvious their real intent. Ms. Slobodian was truly a "captive" audience as she had nowhere else to go. Her protestations were viewed by Mr. Mitchell as "a joke". What may have been amusing for the "cat" was understandably less so for the "mouse". This was Ms. Slobodian's workplace and her continued employment depended on Mr. Mitchell's opinion of her. When she rejected his physical advances, he instructed her not to tell her husband. I can find no evidence of a "joke" in any of this.

I conclude therefore that Mr. Mitchell did infringe Ms. Slobodian's rights under the Code by subjecting her to sexual harassment , advance, and solicitation while in a position to confer, grant or deny a benefit or advancement.

6. Liability of Mr. Mitchell

From the information before me, Mr. Mitchell as manager of the St. Catharines store, was Ms. Slobodian's direct supervisor. Having found that he directly infringed Ms. Slobodian's rights under section 7(2) and (3) of the Code, the Board finds Mr. Mitchell personally liable for his actions and subject jointly and severally to the order set out below.

7. Liability of Employer

The employer listed on Ms. Slobodian's T4 slip for 1990 was Adam's Warehouse Burlington Ltd. She testified that her paycheques were received from the Hamilton office of Adam's Warehouse.

Ms. Scott, on behalf of the Commission, made submissions to amend the complaint filed by Ms. Slobodian on August 22, 1990 to correctly identify the employer and ensure that the remedies intended by the Code can be carried out.

Ms. Scott submitted that Ms. Slobodian's employer, whatever its correct legal entity, was liable for the actions of Mr. Mitchell. She relied on the decision of an Ontario Board of Inquiry in Wei Fu v. Ontario Government Protection Service (1985) 6 C.H.R.R. D/2797 which set out a number of situations in which an employer would be personally in breach of the Code.

Before considering liability, the question of how to characterize the employer as a legal entity arises. The complaint names "Adam's Warehouse, 193 Cavell Avenue, Hamilton, Ontario L8L 8C9" as employer of both Mr. Lennox Mitchell and Ms. Donna Slobodian on the dates relevant to the complaint. I received the following information regarding the correct legal entity or identity of Ms. Slobodian's employer:

- a) Mr. West, the solicitor who handled the respondents' case throughout the Commission's investigation advised, by letter dated April 26, 1993, that Adam's Warehouse in St. Catharines was owned by a numbered company, with liabilities and no assets; that Lennox Mitchell was always contacted through Eric Adams at Hamilton's Adam's Warehouse, at the address given on the complaint; that he had been unable to obtain instructions from his clients; and that as of June 28, 1993, he would no longer be in private practice.

b) On May 5, 1993, Mr. West, the Commission and the Board agreed further efforts were needed to clarify ownership of Adam's Warehouse in St. Catharines and further time was given to allow Mr. West to obtain instructions from his clients.

c) On May 17, 1993, Mr. West advised that Adam's Warehouse in St. Catharines was owned by 775642 Ltd., a company carrying on business under the name Adam's Warehouse, and that as of December, 1989, 775642 Ltd. had ceased carrying on business. The principal director of 775642 Ltd. was Mitchell Adams, son of Eric Adams, who was principal director of Adam's Warehouse Burlington Ltd..

d) At the hearing, Ms. Scott submitted that "Adams Warehouse Burlington Ltd.", not 775642 Ontario Ltd., was the appropriate corporate entity responsible for the operation of the St. Catharines store at the time of the events in question. This company, which also operated a store of the same name in Hamilton, paid Ms. Slobodian's salary while she was employed in their St. Catharines store. Ms. Scott submitted corporate searches for 775642 Ontario Ltd. and Adams Warehouse Burlington Ltd. and requested that the complaint be amended to read "Adams Warehouse Burlington Ltd." instead of "Adam's Warehouse".

I agree that there was nothing in the evidence presented to suggest that the St. Catharines store known as Adam's Warehouse was owned or operated by 775642 Ltd. There was, however, evidence to suggest that it was essentially a branch operation of the Hamilton store at 193 Cavell Street, also known as Adam's Warehouse, which was owned and operated at the time of the complaint by Adams Warehouse Burlington Ltd.. According to Ministry of Consumer and Commercial Relations' records, the head office of this company was 193 Cavell Street, Hamilton, Ontario L8L 8C9.

On the facts of this case, there was no surprise or unfairness resulting from the requested amendment of the complaint at the hearing stage. Eric Adams, principal director of Adams Warehouse Burlington Ltd., responded to the initial complaint as filed against the discount store of the same name in St. Catharines. Up to September, 1990, when the Commission was advised to refer all matters to their

solicitor, Mr. West, the Commission dealt directly with Mr. Adams. Subsequent to Mr. West's removal from the record in or about May 1993, the Commission dealt again with Mr. Adams. In other words, all procedural and substantive issues arising from Ms. Slobodian's complaint have been dealt with by Mr. Eric Adams, on behalf of Adam's Warehouse, and Mr. Lennox Mitchell, in his personal capacity, except when under express direction by Mr. Adams to deal directly with Mr. West for both respondents.

While Adams Warehouse Burlington Ltd. was Ms. Slobodian's employer at the time of the infringement of the Code, Ms. Scott asked that United Salvage Canada Inc. be added as a respondent and also be found liable on the basis that:

- a) since 1984, Adams Warehouse Burlington Ltd. operated a business activity ("salvage and bankruptcy liquidators" and "Liquidator - Purchase & Sale of Damaged Goods") under the name "United Salvage"; as evidenced by the corporate records of the Ministry of Consumer and Commercial Relations;
- b) this business activity continued without any significant change, either to the public, or to its directors, under the new corporate name and entity of United Salvage Canada Inc., when it was created on September 29, 1992. Adam's Warehouse Burlington Ltd. apparently has declared bankruptcy but despite Ms. Scott's attempts to clarify its current legal status, nothing was provided to her, when requested, by either Mr. Adams or the named Receiver/Trustee.
- c) Eric Adams and two members of his family are directors of both companies and both companies list as their address 193 Cavell Avenue, Hamilton, L8L 9C9.

Ms. Scott acknowledged that there were no express provisions in the Code regarding liability for successor companies. She argued, however, that this was not a case where such provisions were necessary, since there was in essence no new company, no sale to a successor, but just a name change to defeat creditors of

Adams Warehouse Burlington Ltd. which reportedly is in some stage of bankruptcy. She referred to an unreported decision of Mr. Justice Sheard of the Ontario Court dated October 5, 1992 Stone County Specialties Incorporated v. Wiesco Canada Limited, Wiesco Canada Inc. and Peter Wiese. Judgement was issued against both Wiesco Canada Limited (the former entity) and Wiesco Canada Inc. (the subsequent entity) and the Court stated:

The second company, under the continuing guidance of its sole shareholder, Peter Wiese, rose from the ashes of the first, to maintain an unbroken continuum of function. That included retaining possession of the equipment that Limited had sold to the plaintiff and then received back, ostensibly for re-sale on consignment. The provisions of the Fraudulent Conveyances Act, pleaded by the plaintiff, are difficult to apply to the facts here, but the plaintiff should not be defeated by the device of creating a new company, under the continuing direction of the same mind as its predecessor, and continuing in the same business; it was essentially simply a change of name.

I am not, however, persuaded that judgment should go against Peter Wiese personally. ...While there can be circumstances where it is appropriate to ..."pierce the corporate veil", I do not find those circumstances exist here.

(Emphasis added)

Ms. Scott also referred to an unreported decision of a Human Rights Tribunal under the Canadian Human Rights Act, dated July 30, 1992, Bouvier v. Metro Express and Regent Lacroix, dealing with a complaint of sexual harassment, which stated nothing in the Act made a successor employer liable for discriminatory acts committed by a previous employer, but added:

That does not mean, however, that a successor employer will never be liable for discriminatory acts committed by the employee of the previous employer. Thus, for example, if the sale of a business was simply a sham transaction between two closely related companies, such as companies with common directors or shareholders, obviously the use of such a subterfuge, designed to avoid the effect of the Act, would go directly counter to the Act, and accordingly should not be accepted as exempting the successor employer from liability.

(Emphasis added)

Ms. Scott advised that notice of her intent to ask the Board to add United Salvage Canada Inc as a party to the complaint was given, orally and in writing, to Mr. Eric Adams, prior to the hearing, in his capacity as director of United Salvage Canada Inc. and as director of Adams Warehouse Burlington Ltd. Notwithstanding this notice, Mr. Adams chose to make no submissions or attend the hearing to address this issue.

The Board agrees that on the facts presented, there is at most a change in name, with the principal shareholders, directors, and business remaining unchanged and that there is not new "successor employer" *per se*.. While the complaint is against the actions of Adams Warehouse Burlington Ltd as employer, and while that particular company may or may not be judgment proof, the case law presented supports the application of the Code where nothing about the employer is changed but the corporate name. It would not be consistent with the objectives of the Legislature, as set out in the preamble, to allow persons to avoid the obligations set out in the Code by simply undergoing a corporate name change, while continuing to operate the same business.

While corporations are distinct legal entities, there are circumstances where courts have "pierced the corporate veil", looking to substance rather than form to determine liability. Madame Justice Wilson, of the Supreme Court of Canada, set this out in Constitution Insurance Co. of Canada et al v. Kosmopoulos et al, 34 D.L.R. (4th) 208:

As a general rule a corporation is a legal entity distinct from its shareholders...The law on when a court may disregard this principle by "lifting the corporate veil" and regarding the company as a mere "agent" or "puppet" of its controlling shareholder or parent corporation follows no consistent principle. The best that can be said is that the "separate entities" principle is not enforced when it would yield a result "too flagrantly opposed to justice, convenience

or the interests of the Revenue: L.C.B. Gower, *Modern Company Law*, 4th ed. (1979) at p. 112

On the particular facts of that case, lifting the veil would have allowed Mr. Kosmopoulos to both receive the "benefits of incorporation" and "escape its burdens". In such circumstances, the Court did not lift the veil because to do so would have not avoided an unjust result but would have permitted Mr. Kosmopolous to "blow hot and cold" at the same time.

On the particular facts of the case before the Board, however, it is necessary to lift the corporate veil, in the sense of looking to substance rather than form, to avoid a result "too flagrantly opposed to justice". At the time of the alleged events, Ms. Slobodian's employer was Adams Warehouse Burlington Ltd. operating as United Salvage in the business of selling liquidated goods to the public in its St. Catharines outlet. That business continues, minus the St. Catharines outlet, under the name United Salvage Canada Inc. The person behind the corporate veil at all times and the person in a position to stop the conduct alleged was Eric Adams, director of both companies.

I find United Salvage Canada Inc., through its principal director, Mr. Adams, to be corporately liable for the acts and omissions of Mr. Adams, as principal director of Adams Warehouse Burlington Ltd., for the purposes of the complaint of Ms. Slobodian under the Code.

While there is no legislative provision for vicarious liability for corporations in the case of sexual harassment (see section 45 and its exclusion of s. 7), case law has extended liability in such circumstances using the organic theory of corporate liability. As stated by the Board of Inquiry in Wei Fu v. Ontario Government Protection Service supra at page D/2801:

Where the employer is a corporate entity, and an employee is in contravention of the Code, and that employee is part of the "directing mind" of the corporation, then the employer corporation is itself personally in contravention. The act of the employee becomes the act of the corporate entity itself, in accordance with the organic theory of corporate responsibility...For example...where the sole managerial employee was guilty of sexual harassment, the employer corporation was itself personally committing the act of sexual harassment.

The Board in that case acknowledged the difficulty in determining when an employee is part of the "directing mind" but stated that "generally speaking, whenever an employee provides some function of management, he is then part of the 'directing mind'."

I also find that, under the organic theory of corporate liability, Mr. Mitchell, as manager of the St. Catharines store, performed a management function for both companies. His acts, as manager of the St. Catharines store, were acts of a directing mind of the corporation. As sole manager of the St. Catharines store, Mr. Mitchell was not a "mere servant" but part of the "directing mind" of Adams Warehouse Burlington Ltd.

8. Remedy sought

Ms. Scott sought special damages in the amount of \$6,000, for lost wages for 30 weeks, between February 1, 1990 and September 1, 1990 at the rate of \$200 per week, with interest accruing from May 15, 1990. This weekly figure is based on Ms. Slobodian's net pay and it was asked that no deductions should therefore be made from this for taxes, etc. It was submitted that Ms. Slobodian was young and inexperienced at the time of the events and it was not unreasonable for her to have taken the path of least resistance by quitting. Ms. Slobodian looked for a job in this period through Canada Manpower and made application for positions, one of

which was successful. Ms. Slobodian has worked with this new employer since September, 1990.

Ms. Scott also requested that Ms. Slobodian be awarded general damages for mental anguish plus interest.

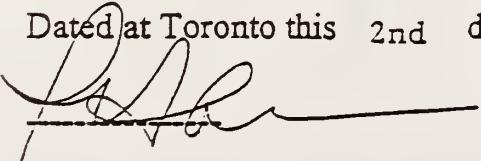
9. Order

The Board orders Lennox Mitchell, Adams Warehouse Burlington Ltd., and United Salvage Canada Inc., who are jointly and severally liable, to pay to Ms. Slobodian the following:

- a) special damages in the sum of \$6000, representing net wages in the period February 1 to September 1, 1990, plus interest in accordance with the Courts of Justice Act, from May 15, 1990 to the date of this order;
- b) general damages in the sum of \$2500, for mental anguish;
- c) post-judgment interest of 6% on the total amount owing from the date of this order.

The Board orders Lennox Mitchell, Adams Warehouse Burlington Ltd., and United Salvage Canada Inc. to meet with the Commission to work out an anti-harassment policy, with reporting mechanisms, to be posted prominently in their offices, stores, warehouses, or places of business.

Dated at Toronto this 2nd day of May, 1994.


R. Hartman

